119

No. 08-846

Supreme Court, U.S.
FILED
FEB 6 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, MEDICINE WHEEL COALITION ON SACRED SITES IN NORTH AMERICA, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA, KEWEENAW BAY INDIAN COMMUNITY, AND PUEBLO OF SANTA ANA IN SUPPORT OF THE PETITIONERS

JOHN DOSSETT
General Counsel
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Avenue, NW
Washington, D.C. 20036

STEVEN C. MOORE
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

JILL E. TOMPKINS
AMERICAN INDIAN LAW CLINIC
UNIVERSITY OF COLORADO
SCHOOL OF LAW
2450 Kittredge Loop Road
Boulder, CO 80309

M. BRENT LEONHARD
Deputy Attorney General
CONFEDERATED TRIBES
OF THE UMATILLA
INDIAN RESERVATION
P.O. Box 638
Pendleton, OR 97801
Counsel for Confederated Tribes of the Umatilla Indian Reservation

JOHN R. BAKER
Tribal Attorney
KEWEENAW BAY
INDIAN COMMUNITY
16429 Bear Town Road
Baraga, MI 49908
Counsel for Keweenaw Bay Indian Community

MICHELLE LAPENA
Tribal Attorney
P.O. Box 18
Brooks, CA 95606
Counsel for Rumsey Indian Rancheria of Wintun Indians of California

RICHARD A. GUEST
NATIVE AMERICAN
RIGHTS FUND
1712 N Street, NW
Washington, D.C. 20036

JOHN T. HARRISON
THE CONFEDERATED SALISH
AND KOOTENAI TRIBES
OF THE FLATHEAD
RESERVATION
TRIBAL LEGAL DEPARTMENT
P.O. Box 278
Pablo, MT 59855
Counsel for Confederated Salish and Kootenai Tribes of the Flathead Reservation

JILL ELISE GRANT
NORDHAUS LAW FIRM, LLP
1401 K Street, NW
Suite 801
Washington, D.C. 20005
Counsel for the Pueblo of Santa Ana

QUESTION PRESENTED

The U.S. Forest Service has authorized a ski resort to begin spraying millions of gallons of recycled sewage water (in the form of artificial snow) onto the most sacred mountain of southwest Native American tribes – a site that is a wellspring of the tribes' spirituality and that serves an indispensible role in their religious practices and rituals. The tribes contend that this authorization violates the Religious Freedom Restoration Act ("RFRA"), under which the federal government may not "substantially burden" a person's exercise of religion unless its action is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. A divided en banc panel of the Ninth Circuit rejected this claim at its threshold, holding that a "substantial burden" exists under RFRA "only when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Pet. App. 20a. Spraying sewage water onto the mountain would do neither of these particular things, notwithstanding the profound impact it would have on the tribes' spirituality and religious practices.

The question presented, over which there is widespread disagreement among the circuits, is:

QUESTION PRESENTED – Continued

Whether a governmental action cannot constitute a "substantial burden" under RFRA unless it forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
ARGUMENT	4
I. The Court Needs To Clarify The Meaning Of "Substantial Burden" And Eliminate The Confusion Created By The Federal Courts Of Appeals	4
A. The Ninth Circuit's Restrictive Definition of "Substantial Burden" Excludes Many American Indian Religious Practices From The Protections of RFRA	7
B. The Ninth Circuit's Restrictive Definition of "Substantial Burden" Adversely Impacts The Accommodation of American Indian Religious Interests At The Federal Agency Level	9
II. The Record In This Case Dramatically Illustrates The Nature Of Native Religious Practices And Provides An Excellent Vehicle To Define "Substantial Burden"	12
III. The Government May Not Invoke Slippery-Slope Concerns To Justify Its Actions Under The Religious Freedom Restoration Act	21
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES:

Bear Lodge Multiple Use Association v. Babbitt, 175 F.3d 814 (10th Cir. 1999) 10

Employment Division v. Smith, 494 U.S. 872 (1990) 8

Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 22

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 7, 9, 11

Natural Arch and Bridge Society v. Alston, 209 F.Supp.2d 1207 (D. Utah 2002), *aff'd* 98 Fed.Appx. 711 (10th Cir. 2004) 10

Wyoming Sawmills, Inc. v. U.S. Forest Service, 383 F.3d 1241 (10th Cir. 2004) 10

STATUTES:

Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.* (2005) 9

American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469, 470, 42 U.S.C. § 1996 (1978) 4, 16, 18

Pub. L. No. 95-341, 108 Stat. 3125 19

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2004) 1, 22

Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc (2004) 18

TABLE OF AUTHORITIES – Continued

Page

Treaty with the Navajo of September 9, 1849, 9 Stat. 974 (1849) 14

Treaty with the Navajo of June 1, 1868, 15 Stat. 667 (1868) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I 7

OTHER AUTHORITIES:

10 ENCYCLOPEDIA OF RELIGION 130-33 (1987) 12, 15

123 Cong. Rec. 519766-67 (December 15, 1977) 4

124 Cong. Rec. H6842 (July 17, 1978) 17

Brian Edward Brown, *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land* 6-7 (1999) 19

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.03[2](c)(ii)(B) (2005) 18

Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L. J. 483, 510 (1999) 19

Department of Interior, Bureau of Indian Affairs Notice, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 72 Fed. Reg. 13648-01 (March 22, 2007) 5

TABLE OF AUTHORITIES – Continued

Page

Deward E. Walker Jr., *Protection of American Indian Sacred Geography*, HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 100 (1991) 20

Hill Cumorah Visitor Center, http://www.hillcumorah.org 18

KING JAMES BIBLE, Exodus 3:2-5 16

New Advent, *Catholic Encyclopedia, Notre-Dame de Lourdes*, http://www.newadvent.org/cathen/09389b.htm 15

Sacred Destinations, http://www.sacred-destinations.com/sacred-sites/sacred-mountains.htm 13

The Church of Jesus Christ of Latter Day Saints, http://www.mormon.org. 18

U.S. Forest Service Regions, http://www.fs.fed.us/contactus/regions.shtml 5

U.S. Geological Survey, *Indian Land Areas Judicially Established*, http://education.usgs.gov/common/resources/mapcatalog/images/culture/indian_land_judicial_areas_11x15.pdf 6

USDA Forest Service, Bighorn National Forest, Medicine Wheel/Medicine Mountain Historic Preservation Plan, § I (September 1996) *see* www.fs.fed.us/r2/bighorn/recreation/heritage/nativeamericans 10

Vine Deloria, Jr., *God is Red: A Native View of Religion* 271 (1994) 3

STATEMENT OF INTEREST[1]

The Religious Freedom Restoration Act ("RFRA") was enacted by Congress to provide a remedy to those whose religious practices are substantially burdened by governmental actions. RFRA provides that "Government shall not substantially burden a person's exercise of religion" unless the government's action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Despite the clear intent of Congress, the *en banc* decision by the U.S. Court of Appeals for the Ninth Circuit has severely circumscribed the scope of RFRA to exclude many American Indian religious practices.

The National Congress of American Indians ("NCAI") is the oldest, largest and most representative American Indian and Alaskan Native organization in the United States, representing over 250 Indian nations, tribes and village governments. NCAI is dedicated to protecting the rights and improving the welfare of all indigenous peoples in the United States. NCAI has a keen interest in protecting American Indian and Alaska Native religious practices, and is particularly concerned with protecting sacred sites

---

[1] No counsel for a party authored the brief in whole or part. No counsel for a party made a monetary contribution to the preparation or submission of the brief. The counsel of record for each party received timely notice of the intent of *amici curiae* to file this brief and written consent was granted by each party.

on public lands that are critical to American Indian religious practices.

The Medicine Wheel Coalition on Sacred Sites of North America is a coalition of eight Plains Indian tribes located in the states of Wyoming, Montana, South Dakota, Minnesota and Oklahoma. The Board of Directors is appointed by the member tribes. The purpose of the Coalition is to protect Native American Indian religious freedom, promote access to and protection of sacred land sites and advocate for repatriation of ancestral remains, burial items and sacred objects.

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Confederated Tribes of the Umatilla Indian Reservation, Rumsey Indian Rancheria of Wintun Indians of California, the Keweenaw Bay Indian Community, and the Pueblo of Santa Ana are federally recognized Indian tribes who maintain a government-to-government relationship with the United States established under treaties, executive orders, statutes and other laws. These individual Indian tribes share a common interest in protecting sacred sites, including sacred sites located on public lands, within their aboriginal territories, in preserving the rights of their tribal members to freely exercise their religious practices within these sites, and ensuring the survival of tribal identity and culture for future generations.

Amici believe that a functional standard for meaningful accommodation of sacred sites on public

lands requires what scholar Vine Deloria, Jr. describes as "a willingness on the part of non-Indians and the courts to entertain different ideas about the nature of religion." Vine Deloria, Jr., *God is Red: A Native View of Religion* 271 (1994). When efforts at accommodation fail due to the current confusion in the federal circuits about the meaning of "substantial burden" under RFRA, *amici* fear that cases like this one will continue to arise in the public lands context.

Amici share an interest in asking this Court to step in and settle the debate – to articulate a standard that both works in practice and conforms with Congress' intentions in enacting RFRA. A functional, objective and straightforward standard will lessen the number of RFRA claims by clarifying for federal land managers and potential American Indian tribal litigants the permissible bounds of accommodation, without opening a Pandora's Box of specious claims. *Amici* are gravely concerned that federal land management decisions under the Ninth Circuit standard that do not fully take into account the impact on American Indian religious belief and practice will severely impact the spiritual lives of tribal members, now and in the future.

Additionally, by articulating a standard that assures meaningful accommodation of American Indian land-based religions, this Court will ensure that Congress' intent that RFRA provide a remedy at law for all religious practices substantially burdened by the government will be carried out. "America does

not need to violate the religions of her native peoples. There is room for and great value in cultural and religious diversity. We would all be poorer if these American Indian religions disappeared from the face of the Earth." 123 Cong. Rec. 519766-67 (December 15, 1977) (remarks of Senator Abourezk of South Dakota supporting passage of the American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469, 470, 42 U.S.C. § 1996 (1978).

ARGUMENT

I. The Court Needs To Clarify The Meaning Of "Substantial Burden" And Eliminate The Confusion Created By The Federal Courts Of Appeals.

In the wake of the *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit in *Navajo Nation v. United States Forest Service*, which reversed a unanimous three-judge panel, American Indian tribes and federal land managers in nine federal circuits are struggling with an array of "substantial burden" standards. *See* Petition for Certiorari at 12-13; 23-24.[2] Petitioners correctly observe

[2] Federal land managers are responsible for areas that encompass lands in two different circuits, which would mean they would apply different standards on either side of a line drawn by the agency. For example, two Forest Service Regional Offices encompass lands both in the Ninth and Tenth Circuits.

(Continued on following page)

that several Indian reservation boundaries span federal circuit boundaries.[3] Beyond that, tribal *aboriginal* territories are much larger than reservation boundaries and Indian tribes generally have concerns about the management of sacred land areas and land forms throughout their aboriginal territories.

Many sacred sites with which Indian tribes and their members have deep religious connections go back hundreds or thousands of years and are located outside of their present-day reservation boundaries – but *within* their aboriginal territories. *Amici* have identified at least sixteen tribal groupings (that make up many more than sixteen federally-recognized tribes) that have aboriginal territories which are located in more than one federal circuit,[4] and twenty

---

(Region 3 and Region 4), *see* U.S. Forest Service Regions, available at http://www.fs.fed.us/contactus/regions.html.

[3] In addition to the Navajo Nation and the Goshute Indian Tribe referenced in the Petition for Certiorari, the following tribes have reservations in more than one federal appellate circuit: Iowa Tribe of Kansas (10th Circuit) and Nebraska (8th Circuit); Pokagon Band of Potawatomi Indians in Michigan (6th Circuit) and Indiana (7th Circuit); and Sac and Fox Nation of Missouri in Kansas (10th Circuit) and Nebraska (8th Circuit). *See* Department of Interior, Bureau of Indian Affairs Notice, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 72 Fed. Reg. 13648-01 (March 22, 2007).

[4] As established through a review of decisions by the Indian Claims Commission: The Mandan, Hidatsa and Arikara Nation (8th and 9th Circuits); Crow Tribe (9th and 10th Circuits); Shoshone (9th and 10th Circuits); Goshute (9th and 10th Circuits); Southern Paiute (9th and 10th Circuits); Navajo (9th

(Continued on following page)

tribal groupings that have aboriginal territories in more than one region of the United States Forest Service.[5]

The result is a hodge-podge of RFRA "substantial burden" standards across the federal circuits, the Forest Service administrative regions, Indian reservations and aboriginal territory boundaries. Federal land management decisions, in particular those decisions impacting religious practices, should be

---

and 10th Circuits); Chiricahua Apache (9th and 10th Circuits); Mescalero Apache (5th and 10th Circuits); Kiowa, Comanche, Apache (5th and 10th Circuits); Cherokee (4th, 6th, and 11th Circuits); Osage (8th and 10th Circuits); Cheyenne and Arapaho, Northern Cheyenne, and Northern Arapaho (8th and 10th Circuits); Sioux (7th, 8th, 9th, 10th Circuits); Chippewa (6th, 7th, 8th Circuits); Potawatomi (6th and 7th Circuits); Sac and Fox (7th and 8th Circuits); Pawnee (8th and 10th Circuits). *See* U.S. Geological Survey, *Indian Land Areas Judicially Established*, available at http://education.usgs.gov/common/resources/mapcatalog/images/culture/indian_land_judicial_areas_11x15.pdf.

[5] Comparing Regional National Forest Boundaries to the map of *Indian Land Areas Judicially Established*, the following tribal groupings cross more than one U.S. Forest Service Region:

> Navajo – Regions 2, 3; Southern Paiute – Regions 3, 4, 5; Northern Paiute – Regions 4, 5, 6; Mescalero Apache – Regions 3, 8; Jicarilla Apache – Regions 2, 3; Kiowa, Comanche, Apache – Regions 2, 3, 8; Hualapai – Regions 3, 4; Yavapai – Regions 3, 4; Mohave – Regions 3, 4; Quechan – Regions 3, 4; Western Shoshone – Regions 4, 5; Washoe – Regions 4, 5; Nez Perc – Regions 1, 4, 6; Coeur d'Alene – Regions 1, 6; Kalispel – Regions 1, 6; Kootenai – Regions 1, 6; Crow – Regions 1, 2; Sioux – Regions 1, 2, 9; Chippewa – Regions 1, 9; Osage – Regions 2, 8, 9. http://www.fs.fed.us/contactus/regions.shtml.

based on a uniform national set of legal criteria – not a varied set of criteria dependent on the federal circuit in question. Federal law must strive to provide a consistent and uniform set of standards to guide federal agencies and the constituents they serve.

A. The Ninth Circuit's Restrictive Definition of "Substantial Burden" Excludes Many American Indian Religious Practices From The Protections of RFRA.

The RFRA standard adopted by the Ninth Circuit simply defies common sense – especially in the context of religious practices by American Indians. A decision to permit an action on public lands which interferes with traditional religious practices will usually not force American Indians to choose between engaging in those religious practices or face either government civil or criminal sanctions, or the withholding of a government benefit. The effect of the substantial burden standard adopted by the Ninth Circuit is to *exclude* many American Indian land-based religious practices from virtually all protection or consideration under RFRA.[6]

---

[6] This standard has incorrectly been engrafted onto RFRA by the Ninth Circuit from the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), decided in the context of the free exercise clause of the First Amendment, which speaks in terms of the "prohibition" on free exercise, and not on the less restrictive RFRA standard of substantial burdens on religious practice.

Congress did not intend this disequilibrium. At present in the Ninth Circuit, from a practical perspective, there is *no* burden on American Indian religious practices caused by incompatible uses which will satisfy the threshold "substantial burden" requirement under RFRA, which in turn triggers the compelling interest and least restrictive means test imposed by Congress following *Employment Division v. Smith,* 494 U.S. 872 (1990). Congress intended a fair balancing of respective religious and governmental interests. There is nothing in the plain language of RFRA which supports a contrary interpretation, an interpretation that, in effect, reads American Indian religions out of RFRA.

Federal land management decisions under the Ninth Circuit standard may no longer be required to meaningfully take into account the impact on American Indian religious belief and practice. Such decisions will severely impact the spiritual lives of tribal members, now and in the future. Where management decisions regarding recreation, tourism, natural resource development, and other potential uses result in the alteration or destruction of sacred sites, it becomes an intrusive invasion of American Indian religion and tribal identity. Thus, a single ill-informed decision by a federal land manager may severely erode or eliminate the ability of Native practitioners to engage in religious practices. Such a decision may also threaten the survival of an entire Indian tribe's traditional religion and spiritual identity.

B. The Ninth Circuit's Restrictive Definition of "Substantial Burden" Adversely Impacts The Accommodation of American Indian Religious Interests At The Federal Agency Level.

The cramped, narrow standard for "substantial burden" articulated by the Ninth Circuit in *Navajo Nation* also sends an unfortunate signal to federal land managers – factual evidence of burden on religious practices is no longer relevant in determining whether a substantial burden has occurred under RFRA. This signal will skew the administrative fact-finding and record-making responsibilities of land managers under federal laws such as the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.* (2005) Relationships between federal land managers, American Indian tribes and Native religious practitioners, which have been in a tenuous but improving state since the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 452 (1988), will once again be eroded reverting in a renewed lack of trust and respect between the parties.

Prior to the Ninth Circuit's decision in *Navajo Nation,* the negotiations between federal land managers and American Indian tribes were conducted with RFRA and its requirements in mind. Within this framework, the vast majority of land-use conflicts have been resolved long before the need to file legal actions in court. The meaningful accommodation achieved at the Medicine Wheel National Historic Landmark in the Bighorn National Forest in

Wyoming provides a specific example of a workable solution between federal land managers and various tribes and American Indian religious practitioners who hold sacred the Medicine Wheel and Medicine Mountain. A 1996 Medicine Wheel/Medicine Mountain Historic Preservation Plan was prepared "to ensure the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional cultural property." USDA Forest Service, Bighorn National Forest, Medicine Wheel/Medicine Mountain Historic Preservation Plan, § I (September 1996) *see* www.fs.fed.us/r2/bighorn/recreation/heritage/nativeamericans. These accommodations were mutually agreeable to the American Indian religious interests, to the Big Horn County Commissioners who were concerned about access to commodity, recreational, and tourist uses, and to the U.S. Forest Service charged with management of the area. *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004).

Other success stories include the Devil's Tower National Monument (Wyoming) voluntary climbing ban in June of each year, *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), and the Rainbow Bridge National Monument (Arizona) interpretative signage and road closures for American Indian sacred ceremonies. *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207 (D. Utah 2002), *aff'd* 98 Fed.Appx. 711 (10th Cir. 2004). These examples demonstrate that Justice O'Connor's

admonition in *Lyng*, *supra*, that the government should accommodate American Indian religious values and practices is working in myriad circumstances: "[N]othing in our opinion [in *Lyng*] should be read to encourage governmental insensitivity to the religious needs of any citizen" and "the Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." 485 U.S. at 453-54.

Under RFRA, Congress intended that tribes have access to the courts when, despite proposed agency accommodations, tribes and religious practitioners are able to produce evidence that there is still a substantial burden on religious practice. It is in these instances that RFRA requires that a balancing of religious and governmental interests occur, and that the governmental interests be required to be compelling and tailored to be the least restrictive on religious values and practices if they are to be upheld. The Ninth Circuit's newly restrictive definition of "substantial burden" has decidedly tipped this balance against accommodation at the federal agency level and upended the scales when the parties reach federal court. In essence, the Ninth Circuit has now said that RFRA no longer matters, taking away a powerful tool for Indian tribes and Native practitioners to persuade the government to be accommodating.

The Court should grant review to bring common sense and uniformity to this vital area of the law and provide federal land managers guidance in relation to

the protections afforded to all religious practitioners under RFRA.

II. The Record In This Case Dramatically Illustrates The Nature Of Native Religious Practices And Provides An Excellent Vehicle To Define "Substantial Burden."

The concept of sacred geography is a fundamental part of most religious traditions in the world, including Christianity, Judaism, Hinduism, Islam, Buddhism, and Shintoism:

> [Sacred] mountains have an important place in the symbolic geography of religious traditions the world over, although the ways in which the mountains are significant have differed. Some have been seen as cosmic mountains, central to an entire worldview; others have been distinguished as places of revelation and vision, as divine dwelling places, or even as geographical manifestations of the divine.

10 ENCYCLOPEDIA OF RELIGION 130-33 (1987). American Indian religious traditions of North America share this common and unifying trait.

The San Francisco Peaks hold attributes of all of these distinguishing characteristics for the Petitioner tribes in this case. Indeed, the Peaks are considered among the world's great sacred mountains, alongside Tepeyac, Mexico (Catholic), Mount Sinai, Egypt

(Judeo-Christian); Mount Kailash, Tibet (Hindu, Buddhist); Mount Nebo, Jordan (Christian); Mount Fuji, Japan (Ainu, Buddhist); and Uluru/Ayers Rock, Australia (Australian Aborigine), to name but a few.[7] For centuries, the Peaks have been the fulcrum for religious practices of Native Americans in the Southwest – the home of spiritual beings, the place of mythological events and an area of origination. Pet. Brf. at 3-5.

Prior to the arrival of European settlers, the San Francisco Peaks were the aboriginal homelands of indigenous peoples whose descendents are members of the petitioner tribes. The Peaks gained their sacred status by virtue of ancient narrative, similar to the story of the Garden of Eden, as the locus of creation filled with the presence of spirits and a place of ritual, ceremony and medicinal gathering over the centuries. For example, the San Francisco Peaks play an important role in the Holy Beings' creation of the Navajo people, their identity, lands, language, culture, and religious (spiritual/ceremonial) practices. The Peaks form part of the foundation for the Navajo Blessingway ceremonies – blessings for traditional and modern Navajo government leadership, planning and prosperity, as well as blessings for the mental, physical, and spiritual well-being of each Navajo person.

---

[7] Sacred Destinations, http://www.sacred-destinations.com/sacred-sites/sacred-mountains.htm.

Intimate relationships between American Indians and their sacred sites such as the Peaks have developed since time immemorial.

Thus, it is not the "choice" of the petitioner tribes and Native religious leaders that the Peaks are a holy place in their aboriginal territory. The treaties, executive orders, and other acts of Congress that rendered the San Francisco Peaks part of the public domain did not diminish the import of these sacred lands to the tribes and individual Native practitioners. *See, e.g.*, Treaty with the Navajo of September 9, 1849, 9 Stat. 974 (1849); Treaty with the Navajo of June 1, 1868, 15 Stat. 667 (1868). Petitioners cannot simply pack up their religious association with the Peaks and go elsewhere to worship; it is not within their power to do so.

The Native stories and songs which surround the Peaks as a sacred place find parallels in many religions. For example, the religious pilgrimages to Lourdes, France, are founded on the eighteen apparitions of the Blessed Virgin to a poor, fourteen-year-old girl, Bernadette Soubiroux. As the story is told, she fell into an ecstasy when the apparitions occurred in the hollow of the rock named Massabielle. Seeing these visions and hearing the voice of the Blessed Virgin, Soubiroux drank from a mysterious fountain in the grotto itself, the existence of which was unknown, but which immediately gushed forth. In 1862, her visions were declared real by the Catholic Church and a basilica was built upon the rock and

the great "national" French Catholic pilgrimages were inaugurated.[8]

Another example is Mount Sinai where the God of the Judeo-Christian tradition first spoke to Moses of his intention to liberate the Israelites:

> And the angel of the LORD appeared unto him in a flame of fire out of the midst of a bush: and he looked, and, behold, the bush burned with fire, and the bush was not consumed. And Moses said, I will now turn aside, and see this great sight, why the bush is not burnt. And when the LORD saw that he turned aside to see, God called unto him out of the midst of the bush, and said, Moses, Moses. And he said Here am I. And he said, Draw not nigh hither: put off thy shoes from off thy feet, for the place whereon thou standest is holy ground.

---

[8] LASSERRE, Notre-Dame de Lourdes; BOISSARIE, L'oeuvre de Lourdes; BERTRIN, Histoire critique des événements de Lourdes, apparitions et guérisons (Paris, 1909), tr. GIBBS; IDEM, Un miracle d'aujourd'hui avec une radiographie (Paris, 1909), referenced in the New Advent, *Catholic Encyclopedia*, http://www.newadvent.org/cathen/09389b.htm. Millions of Catholics have made pilgrimages to Lourdes in the past century and more, and there are reported to be thousands of recorded spontaneous healings to have taken place there. *Id.* Another important sacred Catholic site in the western hemisphere is found in Mexico at Tepeyac, the hill of the Aztec Goddess Tonantzin, which became the very place of the apparition of Our Lady of Guadalupe. THE ENCYCLOPEDIA OF RELIGION, *supra*, at 133-34.

KING JAMES BIBLE, Exodus 3:2-5. Mount Sinai is now the revelatory center of the world for many religious adherents who ritually return each year to pray. Many Americans trace their ancestry to societies and religious traditions which evolved in the Eastern Hemisphere, and they still hold dear the sacred places of these religious traditions. Due to a lack of familiarity with the religious traditions of the first Americans, many in the dominant American society do not easily grasp the connection between public lands, sacred geography and American Indian theology.

Similar to Judeo-Christian beliefs about Mount Sinai, Navajo religious doctrine holds that the San Francisco Peaks is holy ground. Instead of a Navajo medicine man taking off his shoes as Moses was instructed, the medicine man must call the mountain by its sacred name, state the reasons for his presence on the mountain, and proceed according to prescriptions that have been in place since time immemorial. When the medicine man follows proper protocol, the Navajo "burning bush" (Holy Beings) will make its revelations to the medicine man. Navajo spiritual practitioners believe that if recycled sewer water (where the water's "soul" is no longer pure) is sprayed on the San Francisco Peaks, the Navajo "burning bush" will not "appear" any longer -- the religious rites will be ineffective because the medicine man will simply be "going through the motions."

During deliberations on the American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469, 470, 42 U.S.C. § 1996 (1978) ("AIRFA"), Congressman Morris Udall of Arizona, AIRFA's chief architect in the

House of Representatives, eloquently framed the need for this Court to realize the analogous nature of Indian sacred sites to western religious sites:

> It is stating the obvious to say that this country was the Indians long before it was ours. For many tribes, the land is filled with physical sites of religious and sacred significance to them. *Can we not understand that*? Our religions have their Jerusalems, Mount Calvarys, Vaticans, and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these religious sites.

124 Cong. Rec. H6842 (July 17, 1978) (emphasis added). If Mount Calvary, the Holy Mosque in Mecca, or the Wailing Wall were located on public lands in the United States, would they be denied protection under RFRA in the same manner as the San Francisco Peaks? Certainly Congress and the Court would act to protect these holy sites, to ensure that Christians, Jews, Muslims, Hindus, Buddhists and other religious practitioners could meaningfully pray and observe their rituals without interference by the federal government! Petitioners and *amici* are simply seeking equitable treatment for their religions and similar protection for their sacred sites alongside the world's other great religions.

American Indian religions generally exhibit an inseparability from and dynamism with the land and its sacred features. Mainstream religions in the United States, with many of their sacred sites on the other side of the globe, can locate churches and other

places of worship wherever they have the means to acquire real estate.[9] "[W]hile a Christian can practice that religion in many churches around the country, many Indian religious ceremonies can only take place in one particular geographical location." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.03[2](c)(ii)(B) (2005). Thus, oftentimes there is disconnect in the law's treatment of mainstream religious practices and the coterminous nature of American Indian religion, culture and the land.

Sacred places such as the Peaks also have a direct nexus with tribal identity. As Congress recognized in AIRFA, "the religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage, because such practices form

---

[9] The Church of Latter Day Saints of the United States has sacred places in the United States such as the Mormon Tabernacle in Salt Lake City, Utah, Martin's Cove in Natrona County, Wyoming, and Cumorah Hill in Manchester, New York. In Latter Day Saint theology, the "Golden Plates" are a set of bound and engraved metal plates from which Joseph Smith, Jr. said he translated the Book of Mormon. According to Smith, he discovered the plates on September 22, 1823 on Cumorah Hill. To this day Cumorah Hill remains one of the Church's most sacred places. To the Mormon Church's advantage, both Cumorah Hill and the Tabernacle are located on lands owned by the Church. *See* Hill Cumorah Visitor Center, http://www.hillcumorah.org; The Church of Jesus Christ of Latter Day Saints, http://www.mormon.org. Religious properties on private lands are subject to the protection of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc (2004). American Indian sacred lands located on reservations are likewise subject to the protections of tribal law and custom.

the basis of Indian identity and value systems." Pub. L. No. 95-341, 108 Stat. 3125. Where sacred geography may constitute the locus of creation of a people, the home of the spirits that protect those people, or the sole location at which crucial religious ceremonies may be performed or medicines gathered, the integrity of those sites directly sustains the identity of the tribes and the people who hold them sacred: "[S]ince the unique identity of the different Indian tribes is so often coherent with the land that animates and sustains their religious beliefs and practices, bureaucratic decisions to alter land sites are intrusive invasions of tribal self-understanding; the dissipation of tribal identity is the inherent consequence of land desecration." Brian Edward Brown, *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land* 6-7 (1999). [10]

Substantially altering the physical integrity of a sacred site compromises its spiritual integrity, which

---

[10] *Also see* Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L. J. 483, 510 (1999) ("The culture and religion must be passed down through the generations or the culture and religion cannot survive . . . The survival of indigenous cultures and religions requires . . . some individuals to act out of responsibility to their cultures, their peoples. If some people do not accept responsibility for carrying on the culture and religion, others will not have the freedom to choose the tribal religion because it will no longer exist.").

in turn may injure the integrity of a people, their religion, and their culture. If the physical alteration of a sacred place prevents practitioners from carrying out ceremonial practices at that place, they will not be able to pass on those ceremonial practices to the next generation, and those ceremonial practices will be lost. The burden on religion is borne not just by the present generation, but also by future generations who will not even have the opportunity to learn the rituals and pass them on.

The Historical Overview section of the AIRFA Report (August 1979), produced by the Federal Agencies Task Force, as mandated by Section 2 of AIRFA, provides an excellent historic framework within which to understand petitioners' intimate religious connection to the Peaks:

> These [American Indian] religions have the ability and propensity to experience new revelations and each new ceremony which is received by the religious community is given for a specific purpose and must be performed at the place and in the manner, and wherever the original revelation demands, at the time designated. American Indian tribal religions, in many instances, have acknowledged that the present ceremonies, given to them at the beginning of this world, must be performed continuously or great harm and destruction will come to the people.

AIRFA Report at 10-11. *See also* Deward E. Walker Jr., *Protection of American Indian Sacred Geography*,

HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 100 (1991).

The record in this case dramatically illustrates the nature and importance to many American Indian tribes of sacred sites inextricably bound to the land. Moreover, it is crucial that an appropriate standard under RFRA be articulated that balances the interests of the federal government and those of Native religious practitioners. This case provides the Court with that timely opportunity.

III. The Government May Not Invoke Slippery-Slope Concerns To Justify Its Actions Under The Religious Freedom Restoration Act.

The Ninth Circuit justifies its cramped, narrow view of the "substantial burden" standard based on its concern that

> otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

Pet. App. 7a.

This complaint is based upon an erroneous belief that American Indian religious practitioners would be able to go onto federal lands and selectively prohibit particular land uses by identifying an area as religiously significant. However, a unanimous Court in the *O'Centro* case instructed that the United States cannot rely on any parade of horribles argument to justify its actions in the RFRA context:

> [T]he Government's argument for uniformity here is different; it rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to RFRA claims for an exception to generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability." 42 U.S.C. § 2000bb-1(a). Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." § 2000bb(a)(5).

Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435-36 (2006).

Inflated, speculative assertions that American Indian religious servitudes will foreclose important, but competing uses of the federal public lands, such as timber harvesting, mining, oil and gas exploration

and development, grazing, and other uses are belied by actual on-the-ground experience. Indeed, the record in this case makes clear all of the existing recreational uses of the San Francisco Peaks, including skiing, would continue without artificial snowmaking. Indian tribes and the federal government have every incentive to negotiate reasonable accommodations given the uncertainty, difficulty and expense of pursuing litigation under RFRA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN DOSSETT
General Counsel
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Avenue, NW
Washington, D.C. 20036

JILL E. TOMPKINS
AMERICAN INDIAN LAW CLINIC
UNIVERSITY OF COLORADO SCHOOL OF LAW
2450 Kittredge Loop Road
Boulder, CO 80309

STEVEN C. MOORE
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1712 N Street, NW
Washington, D.C. 20036

M. BRENT LEONHARD
Deputy Attorney General
CONFEDERATED TRIBES
OF THE UMATILLA
INDIAN RESERVATION
P.O. Box 638
Pendleton, OR 97801
Counsel for Confederated Tribes of the Umatilla Indian Reservation

JOHN R. BAKER
Tribal Attorney
KEWEENAW BAY
INDIAN COMMUNITY
16429 Bear Town Road
Baraga, MI 49908
Counsel for Keweenaw Bay Indian Community

MICHELLE LAPENA
Tribal Attorney
P.O. Box 18
Brooks, CA 95606
Counsel for Rumsey Indian Rancheria of Wintun Indians of California

JOHN T. HARRISON
THE CONFEDERATED SALISH
AND KOOTENAI TRIBES
OF THE FLATHEAD
RESERVATION
TRIBAL LEGAL DEPARTMENT
P.O. Box 278
Pablo, MT 59855
Counsel for Confederated Salish and Kootenai Tribes of the Flathead Reservation

JILL ELISE GRANT
NORDHAUS LAW FIRM, LLP
1401 K Street, NW
Suite 801
Washington, D.C. 20005
Counsel for the Pueblo of Santa Ana